SUPREME COURT, U. S
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MICHAEL RODAK, JR., C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-185

ROBERT B. GREEN, Individually and as Administrator of the Estate of JAMES MICHAEL GREEN, Deceased,

Petitioner,

vs.

MARTIN H. WEINBERG, M.D.; MICHAEL ROTOFF, M.D.; IVAN F. BIRD, M.D. and J.G. ELIZONDO, M.D., jointly, severally and in the alternative

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 26, 1974

INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional and Statutory Provisions Involved 2
Statement of the Case 4
Reasons for Granting the Writ 5
Conclusion 10
Appendix A - Opinion of District Court and Judgment of the Court of Appeals.11

CASE CITATIONS

Covington v. Harris, 419 F.2d 617 6
Donaldson v. O'Connor, 494 F.2d 507 ... 5,6,8
Humphrey v. Cady, 405 U.S. 504 8
In re Gault, 387 U.S. 1 8
Inmates of Boys Training School v. Affleck, 346, F. Supp. 1354..... 8
Jackson v. Indiana, 406 U.S. 715 8
McNeil v. Director, Patuxent Inst., 407, U.S. 245 8
Martorella v. Kelly, 349 F. Supp. 575 . 7,8
Morales v. Turman, 364 F. Supp. 166 ... 8
Robinson v. California, 370 U.S. 660 .. 9,10
Rouse v. Cameron, 373 F.2d 451 7
Stachulak v. Coughlin, 364 F. Supp. 373 7
Welsch v. Litkins, 42, U.S.L.W. 2475 .. 7
Wyatt v. Stickney, 325 F. Supp. 781 ... 7

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Robert B. Green, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in this proceeding on May 30, 1974.

OPINIONS BELOW

No opinion was rendered by the Court of Appeals; its Judgment Order, affirming

the Order of the District Court, is set forth in Appendix A, infra, p. 13. The oral opinion of the District Court granting Respondents' Motion to Dismiss for failure of the Complaint to state a claim upon which relief may be granted is likewise set forth in Appendix A, infra, p.11.

JURISDICTION

The Judgment Order of the Court of Appeals was entered on May 30, 1974. (Appendix A, infra, p.13). This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether an allegation that a mentally ill person has been deprived of his right to treatment states a claim upon which relief may be granted under the Civil Rights Act, 42 U.S.C. Sec. 1983.

2. Whether there is a constitutionally protected right to treatment for the mentally ill.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Constitution of the United States, Amendment V:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Constitution of the United States, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Constitution of the United States, Amendment IX:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Constitution of the United States, Amendment XIV; Section 1:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law ..."

United States Code, Title 42:

> Sec. 1983. Civil action for deprivation of rights. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

STATEMENT OF THE CASE

On October 6, 1970, petitioner's decedent, his son aged 21, died while a patient at the Forensic Psychiatry Section of the Vroom Building at the State Hospital in Trenton, New Jersey. Prior to that time, in September 1968, the decedent was committed to the Ancora State Hospital, a psychiatric facility. While decedent was a patient at that hospital, petitioner found that decedent was not receiving any substantially beneficial treatment and, in fact, was being harmed by massive doses of tranquillizing drugs. On one visit, petitioner found that decedent was so drugged that he had to be walked around to prevent a coma.

Shortly after petitioner voiced his objections to hospital officials concerning the treatment of his son, the decedent was transferred on June 20, 1969, to the Vroom Building, a facility for the criminally insane. At no time prior to this was petitioner ever advised that such a move was being contemplated, nor was he advised of the transfer until a few days after it took place.

During the fifteen months subsequent to the transfer, petitioner attempted to have his son moved to private psychiatric facilities. Each and every time that petitioner attempted to effectuate such a transfer, conditions were imposed of such a nature to make the transfer impossible. In actuality, decedent had the status of an involuntarily committed patient. During his stay at the Vroom Building, decedent was not given even minimal care or treatment.

Petitioner was advised of the sudden death of his son on October 6, 1970, without his ever having been advised previously that his son was in ill health. An autopsy was made by the State of New Jersey without petitioner's permission and the State has refused to release the results of the autopsy to doctors representing the petitioner.

Petitioner filed a Complaint in the Federal District Court for the District of New Jersey against the directors and the physician in charge of the decedent at the treatment facility. Petitioner alleged that his son's constitutional right to treatment was violated by Respondents and jurisdiction was based on the Civil Rights Act, 42 U.S.C. Section 1983.

The District Court granted Respondents' Motion to Dismiss the Complaint for failure to state a claim upon which relief may be granted. It held that petitioner's allegation sounded in negligence and was therefore not cognizable under the Civil Rights Act. The Court of Appeals affirmed without opinion.

REASON FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

On April 26, 1974 the United States Court of Appeals for the Fifth Circuit held that "a person involuntarily committed to a state mental hospital has a

constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir., 1974).

In Donaldson, the action was brought by a former mental patient under the Civil Rights Act, 42 U.S.C. Sec. 1983, against hospital and state mental health officials. The Court of Appeals sustained a jury verdict of $28,500.00 in compensatory damages and $10,000.00 in punitive damages.

The plaintiff's allegations in Donaldson were virtually identical to those made by petitioner in the case at bar: that treatment was withheld; that efforts were blocked to have the patient released; and that the patient was wrongly housed with the criminally insane. Donaldson further alleged, as did this petitioner, that the hospital officials acted maliciously and in reckless disregard of the patient's rights. Thus, Donaldson was allowed both compensatory and punitive damages.

It seems that in Donaldson both the trial court and the appellate court completely accepted the proposition that an allegation of denial of treatment is cognizable under the Civil Rights Act. This issue was not a ground for appeal.

The Court in Donaldson correctly noted that the issue of the constitutional right to treatment for the mentally ill had never before been addressed by any of the federal courts of Appeals. The District of Columbia Circuit, however,

did express its opinion, in dictum, that the absence of treatment draws into question the constitutionality of commitment statutes. The Court did not find it necessary to decide the issue, however, because it found a statutory right to treatment: "Because we hold that the right to treatment (statutory) provision applied to appellant, we need not resolve the serious constitutional questions ...." Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

The District of Columbia Circuit, after recognizing this statutory right, superimposed a further constitutional right to the "least restrictive alternative" in regard to treatment. Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969). Noting that commitment entails a extraordinary deprivation of liberty, the Court said, "Such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law." 419 F.2d at 623.

It should also be noted that a number of district courts have recognized a constitutional right to treatment for mental patients. See Wyatt v. Stickney, 325 F. Supp. 781, (M.D. Ala. 1971), enforced, 344 F. Supp. 373, appeal docketed sub nom., Wyatt v. Aderholt, No. 72-2634 (5th Cir. 1972); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Welsch v. Litkins, _____F. Supp. _____, 42 U.S.L.W. 2475 (D. Minn. Feb. 15, 1974). In cases involving the detention of juveniles, the right has also been recognized. See Martorella v. Kelly,

349 F. Supp. 575 (S.D.N.Y. 1972); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973).

II. THE DECISION BELOW IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Supreme Court has not yet ruled on whether mental patients have a constitutional right to treatment. However, the Third Circuit, by failing to recognize such a right, has acted in violation of certain principles established by this Court.

Jackson v. Indiana, 406 U.S. 715 (1972), involved commitment after a finding of incompetence to stand trial. This Court established the rule that: "at the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738. As Judge Wisdom noted in Donaldson: "If the 'purpose' of commitment is treatment, and treatment is not provided, then the 'nature' of the commitment bears no 'reasonable relation' to its 'purpose', and the constitutional rule of Jackson is violated." 493 F.2d at 521.

The same rule was applied in McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972), in which a person was held for psychological observation after the expiration of a prison sentence. In addition, in Humphrey v. Cady, 405 U.S. 504, 514 (1972), this Court found that an indefinitely committed sex offender's claim that he was receiving no treatment raised a "substantial constitutional claim."

Furthermore, this Court has discussed the issue of the right to treatment in relation to juvenile offenders. In In re Gault, 387 U.S. 1, 22 n. 30 (1967), the Court wrote:

> ...it should be that to the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a quid pro quo .....
>
> In fact some courts have recently indicated that appropriate treatment is essential to the validity of juvenile custody, and therefore that a juvenile may challenge the validity of his custody on the ground that he is not in fact receiving any special treatment.

It should be remembered that in all of the above cases, the persons incarcerated or committed were all charged with or convicted of some offense; it would seem constitutionally mandated that even greater protection be afforded to those incarcerated merely because of mental illness.

Furthermore, the constitutional right to treatment is compelled by the rationale of Robinson v. California, 370 U.S. 660 (1962). Confinement of mental patients without treatment is punishment for a mere

condition over which the patient has no control. This type of punishment was declared unconstitutional in Robinson on the ground that it was cruel and unusual in relation to narcotic addicts.

The above cited cases, taken together, constitute a recognition by this Court that mental patients must receive treatment in order that their confinement not violate the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM V. EISENBERG,
132 Kings Highway, East
Haddonfield, N.J. 08033
COUNSEL FOR PETITIONER

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT B. GREEN, Individually and as Administrator of the Estate of JAMES MICHAEL GREEN, Deceased, Plaintiff	)	Civil Action 1599-72
vs.	)	ORAL OPINION AND ORDER OF THE COURT
MARTIN H. WEINBERG, M.D., MICHAEL ROTOFF, M.D., IVAN F. BYRD, M.D., and J.G. ELIZONDO, M.D., jointly, severally and in the alternative, Defendants.	)	

Trenton, New Jersey
July 6, 1973

BEFORE THE HONORABLE GEORGE H. BARLOW, USDJ

APPEARANCES:

WILLIAM V. EISENBERG,
For the Plaintiff.

KENNETH S. LEVY, Deputy Attorney General,
For the Defendants.

THE COURT: This is an action by a father on behalf of his deceased son, alleging deprivation of his son's Fifth, Ninth and Fourteenth Amendment rights. Jurisdiction is predicated upon 42 U.S.C. 1983, 28 U.S.C. 1343. It comes before us on a motion to dismiss by the defendants pursuant to 12(b)(6) of the Federal Rules of Civil Procedure, and the matter was decided without oral argument pursuant to the provisions of Rule 78 of the Federal Rules of Civil Procedure.

The plaintiff's deceased son was, by a Court order pursuant to N.J.S.A. 30:4-37, committed to the New Jersey State Hospital at Ancora. He was subsequent transferred to the Vroom Building at the New Jersey State Hospital in Trenton by the Commissioner of Institutions and Agencies in accordance with N.J.S.A. 30:4-83 and N.J.S.A. 30:4-84-3.

The plaintiff alleges that his son died as the result of improper medical treatment. Such an allegation sounds in negligence and is therefore not cognizable under the Civil Rights Act. Smith v. Spina (3d Cir. No. 72-1402, March 1, 1973). Accordingly, we grant defendants' motion to dismiss for failure of the Complaint to state a claim upon which relief can be granted.

We expressly do not reach the question of standing in the disposition of this motion. Without costs.

United States District Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1830

ROBERT B. GREEN, Individually and as Administrator of the Estate of JAMES MICHAEL GREEN, Deceased,

vs.

MARTIN H. WEINBERG, M.D., MICHAEL ROTOFF, M.D., IVAN F. BIRD, M.D., and J. G. ELIZONDO, M.D., jointly, severally and in the alternative

Robert B. Green, Appellant,
(D.C. Civil Action No. 1599-72)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted under Third Circuit Rule 12(6) - May 29, 1974

Before ROSENN and HUNTER, Circuit Judges, and HANNUM, District Judge

JUDGMENT ORDER

After considering appellant's contention that the district court committed reversible error in dismissing appellant's complaint on the ground that no claim was stated under the Federal Civil Rights Act,

It is ORDERED and ADJUDGED that the order of the district court be and is hereby affirmed. Costs taxed against appellant.

BY THE COURT:

_____
Circuit Judge

Attest:

Thomas F. Quinn,
Clerk

DATED: MAY 30, 1974

I hereby certify that on this 26th day of August, 1974 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to William Hyland, Attorney General of New Jersey, State House Annex, Trenton, New Jersey, Counsel for Respondents Martin H. Weinberg, M.D., Michael Rotoff, M.D. and J. G. Elizondo, M.D., and to Horn and Weinstein, Esquires, Guarantee Trust Building, Atlantic City, New Jersey, Counsel for Respondent Ivan F. Bird, M.D. I further certify that all parties required to be served have been served.

WILLIAM V. EISENBERG
132 Kings Highway, East
Haddonfield, N.J. 08033
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTION PRESENTED	1
COUNTER-STATEMENT OF FACTS	2
ARGUMENT—The decisions of the Courts below were clearly correct in finding that petitioner's complaint fails to state a claim cognizable under the Civil Rights Act because it is based upon allegations of malpractice and/or negligence and does not allege "bad faith" on the part of defendant officials	3
CONCLUSION	7

Cases Cited

Donaldson v. O'Connor, 493 F. 2d 507 (5th Cir. 1974)	4
Franklin v. Meredith, 386 F. 2d 958 (10th Cir. 1967)	4
Gittlemacher v. Prasse, 428 F. 2d 1 (3rd Cir. 1970)	5
Isenberg v. Prasse, 433 F. 2d 449 (3rd Cir. 1970)	5
Pierson v. Ray, 386 U. S. 547 (1967)	4
Smith v. Clapp, 436 F. 2d 590 (3rd Cir. 1970)	5
Smith v. Spina, 447 F. 2d 1140 (3rd Cir. 1973)	4
Urbano v. McCorkle, 334 F. Supp. 161 (D. N. J. 1971), 346 F. Supp. 51 (D. N. J. 1972), aff'd 481 F. 2d 1400 (3rd Cir. 1973)	4

Statutes Cited

N.J.S.A. 30:4-37	2
N.J.S.A. 30:4-83	2

PAGE

N.J.S.A. 30:4-84.3 2

42 U.S.C. (Civil Rights Act):

Sec. 1983 2-6

IN THE

Supreme Court of the United States

OCTOBER TERM—1974

No. 74-185

ROBERT B. GREEN, Individually and as Administrator of the Estate of JAMES MICHAEL GREEN, Deceased,

Petitioner,

vs.

MARTIN H. WEINBERG, M.D.; MICHAEL ROTOFF, M.D.; IVAN F. BIRD, M.D. and J. G. ELIZONDO, M.D., jointly, severally and in the alternative,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Counter-Statement of Question Presented

1. Is a complaint on behalf of a deceased mental patient seeking money damages and alleging improper medical

care but not asserting "bad faith" on the part of the defendant officials cognizable under the Civil Rights Act, 42 U.S.C. §1983?

Counter-Statement of Facts

This is a petition by Robert B. Green (hereinafter "petitioner"), individually and as administrator of the estate of James Michael Green, deceased (hereinafter "decedent"), for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit, entered on May 30, 1974, affirming a final judgment of the District Court for the District of New Jersey, dated July 6, 1973, which dismissed petitioner's complaint for failure to state a claim upon which relief can be granted.

Decedent was voluntarily admitted to the State Hospital at Ancora on September 5, 1968, and subsequently committed by order of the court pursuant to the procedures set forth in N.J.S.A. 30:4-37 dealing with voluntary commitments. Decedent's history included four previous admissions to the State Hospital over the period from December 1965 through June 1968.

On June 20, 1969, due to his violent and unmanageable behavior and at the request of the Medical Director of the State Hospital at Ancora, decedent was administratively transferred to the maximum security Forensic Psychiatric Section (hereinafter "Vroom Building") of the Trenton Psychiatric Hospital pursuant to the provisions of N.J. S.A. 30:4-83 and N.J.S.A. 30:4-84.3. Decedent expired on October 20, 1970, while a patient at the Vroom Building.

The complaint was subsequently filed under the Civil Rights Act, 42 U.S.C. §1983. It alleged that decedent

was provided with little or no "proper" medical care or attention, and received improper treatment endangering his "safety"; that as a result of "the failure of defendants to properly treat, maintain, care for, and guard against injury to" decedent, he was caused to die; and demanded compensatory and punitive damages for a sum in excess of $10,000. The second cause of action alleged that as a direct result of defendants' actions, petitioner was required to incur large medical and hospital expenses for which demand in excess of $10,000 was made.

The District Court for the District of New Jersey subsequently found that the above allegations sounded in negligence and as such were not cognizable under the Civil Rights Act and dismissed the complaint. The Court of Appeals for the Third Circuit affirmed the dismissal on the ground that no claim was stated under the federal Civil Rights Act.

On August 26, 1974, the petition for a writ of certiorari was docketed in this court.

ARGUMENT

The decisions of the Courts below were clearly correct in finding that petitioner's complaint fails to state a claim cognizable under the Civil Rights Act because it is based upon allegations of malpractice and/or negligence and does not allege "bad faith" on the part of defendant officials.

It is well established that a simple common law tort does not fall within the purview of the Civil Rights Act, 42 U.S.C. §1983, but rather a fundamental threshold requirement to establish a cause of action is the assertion

of "bad faith" on the part of the defendant officials. *Pierson* v. *Ray*, 386 U. S. 547 (1967). Since the recognition of broad official immunity would effectively frustrate any §1983 action, the courts have adopted a test of "good faith qualified governmental immunity". Consequently, immunity is a valid defense when (1) the official's acts were discretionary, and (2) the official was acting in good faith.

Since *Pierson*, the courts have recognized the defense of good faith for public officials sued under the Civil Rights Act in a wide variety of contexts. See, e.g., *Franklin* v. *Meredith*, 386 F. 2d 958 (10th Cir. 1967) (psychiatrist and superintendent of state hospital); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D. N. J. 1971) and 346 F. Supp. 51 (D. N. J. 1972), *aff'd* 481 F. 2d 1400 (3rd Cir. 1973) (prisons).

Most importantly, *Donaldson* v. *O'Connor*, 493 F. 2d 507 (5th Cir. 1974), which petitioner cites as establishing a conflict between the circuits such as to warrant the grant of certiorari dealt extensively with the issue of the "good faith" defense to §1983 actions. Indeed, the circuit court there sanctioned the instructions of the trial court to find for the defendants if the jury determined that those defendants had acted in good faith. *Id.* at 530. Only after a finding to the contrary were the courts able to reach the issue of whether a §1983 action lay under a claim of a constitutional right to treatment. However, the case before this court lacked the appropriate allegations of "bad faith" and the determination was not ultimately reached upon a consideration of the constitutional right to treatment.

The court in *Smith* v. *Spina*, 447 F. 2d 1140, 1143 (3rd Cir. 1973) was careful to point out this additional dimension of a Civil Right Act suit:

> "It is, of course, fundamental that the Civil Rights Act permits recovery for only 'deprivations of any rights, privileges, or immunities secured by the [federal] Constitution and [federal] laws'. We have recently said: 'It becomes important to delineate that conduct which is actionable in state courts as a tort, and that which is actionable in federal courts under §1983. The two rights of action do not always stand in pari materia. Some common law and statutory torts, although actionable in a state forum, do not rise to constitutional dimensions. The converse is equally true. Conduct may be actionable as a deprivation of constitutional rights where no force and violence has been utilized and there exists no orthodox counterpart of state common law or statutory relief available'."

• • •

The essence of petitioner's complaint was predicated upon the theory that decedent died as a result of receiving "improper" medical treatment while a patient in the Forensic Psychiatry Section at the Trenton State Hospital. As such, the complaint sounds in tort and is not cognizable under the Civil Rights Act, 42 U.S.C. §1983. *Isenberg* v. *Prasse,* 433 F. 2d 449 (3rd Cir. 1970); *Smith* v. *Clapp,* 436 F. 2d 590 (3rd Cir. 1970); *Gittlemacher* v. *Prasse,* 428 F. 2d 1 (3rd Cir. 1970).

Paragraph 12 of the First Count of the complaint vaguely alleges that the decedent received "little or no proper medical care or attention, was improperly cared for . . ." Paragraph 13 states that decedent's death resulted from "the failure of the defendants to properly treat, maintain, care for, and guard against injury to the person of . . . James Michael Green . . ." Such assertions

of negligence must be clearly distinguished from the deprivation of a constitutionally protected right.

The conclusionary assertions of the deprivation of constitutional rights are nowhere supported by factual allegations in the complaint. The District Court and Court of Appeals were not presented with pleadings upon which a case for any constitutional right to treatment for mental patients could be founded. At best, petitioner has presented a cause of action grounded in a difference of opinion as to diagnosis and treatment which, standing alone, fails to lift the suit to a level of constitutional proportions.

Clearly, therefore, suits for money damages filed pursuant to 42 U.S.C. §1983 require an assertion of "bad faith" on the part of defendant officials in addition to an allegation of deprivation of a constitutional right. The instant case reflects a total absence of any such "bad faith". In that absence, even if a court were to find a right to treatment for mental patients of constitutional dimensions, there would still not exist a cause of action for money damages under §1983. Consequently, it is submitted that the petition under consideration does not present an appropriate occasion for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM F. HYLAND,
Attorney General of New Jersey
Attorney for Respondents, Martin H. Weinberg, M.D.; Michael Rotoff, M.D., and J. G. Elizondo, M. D.

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